

**Petition for Review of NPDES, Permit No. IN0025607**  
**City of Terre Haute, Wastewater Treatment Plant, Vigo County.**  
**2007 OEA 1 (05-W-J-3551)**

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**TOPICS:**

summary judgment  
dismiss  
moot  
NPDES  
Damages  
constitutional issues

**PRESIDING JUDGE:**

Gibbs

**PARTY REPRESENTATIVES:**

Permittee: Erika Powers, Esq.,  
Barnes & Thornburg  
Petitioner: S. Curtis DeVoe, Esq., J. Michael Bowman, Esq.,  
Plews, Shadley, Racher & Braun  
IDEM: Sierra Cutts

**ORDER ISSUED:**

January 10, 2007

**INDEX CATEGORY:**

Water

**FURTHER CASE ACTIVITY:**

Motion to Reconsider (denied)

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STATE OF INDIANA	)	BEFORE THE INDIANA OFFICE OF
	)	ENVIRONMENTAL ADJUDICATION
COUNTY OF MARION	)	

IN THE MATTER OF:	)	
	)	
PETITION FOR REVIEW OF NPDES	)	
PERMIT NO. IN0025607	)	
CITY OF TERRE HAUTE	)	CAUSE NO. 05-W-J-3551
WASTEWATER TREATMENT PLANT	)	
VIGO COUNTY	)	

**FINDING OF FACT, CONCLUSIONS OF LAW**  
**AND FINAL ORDER GRANTING IDEM'S**  
**MOTION TO DISMISS**

This matter having come before the Court on the Indiana Department of Environmental Management's Motion to Dismiss, which pleadings are a part of the Court's record; and the Environmental Law Judge ("ELJ"), being duly advised and having read and considered the petitions, motions, evidence, and the briefs, responses and replies of the parties, finds that judgment may be made upon the record and makes the following findings of fact and conclusions of law and enters the following Order:

**Statement of Case**

1. On May 23, 2005, the IDEM issued Final NPDES Permit No. IN0025607 to the City of Terre Haute. This permit contained paragraph I(H) which states:

In the event that the permittee decides to accept any process wastewater from the Marathon Oil Refinery into the Terre Haute Publicly Owned Treatment Works, the permittee is required to submit a request to IDEM to modify its NPDES permit at least 180 days prior to the proposed commencement of such discharge into the Terre Haute POTW. The permittee cannot accept the proposed discharge until the requested NPDES permit modification has been issued by IDEM. This provision is applicable to either a direct discharge of the wastewater into the wastewater treatment plant or an indirect discharge of the wastewater through an industrial contributor to the collection system.

2. On June 10, 2005, Terre Tech, Inc. (the "Petitioner") filed its Petition for Review.
3. On November 17, 2005, the IDEM and the Petitioner both filed Motions for Summary Judgment.
4. On November 18, 2005, the Petitioner filed a Motion to Supplement Petitioner's Brief in Support of its Motion for Summary Judgment.

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5. On December 16, 2005, the Petitioner filed Petitioner's Opposition to IDEM's Motion for Summary Judgment and a Motion to Strike.
6. On December 19, 2005, the IDEM filed IDEM's Response to Petitioner's Brief in Support of its Motion for Summary Judgment. As part of its Response to Petitioner's Brief in Support of its Motion for Summary Judgment, the IDEM moved to strike certain portions of Petitioner's evidence in support of the Motion for Summary Judgment.
7. On January 20, 2006, both parties filed their reply briefs regarding the motions for summary judgment. As part of Terre Tech's Reply in Support of its Motion for Summary Judgment, the Petitioner filed the Second Motion to Strike and Opposition to IDEM's Motion to Strike. On this same day, the IDEM filed the Indiana Department of Environmental Management's Response to Motion to Strike.
8. On March 7, 2006, the Petitioner filed Terre Tech's Motion to Set Summary Judgment Motions for Hearing.
9. On March 9, 2006, the IDEM filed its Reply to Petitioner's Second Motion to Strike and Motion to Strike Designated Evidence.
10. This matter was set for oral argument on May 16, 2006
11. On April 25, 2006, the ELJ issued an Order on the Motion to Supplement and to Strike. Exhibit 2 of IDEM's Motion for Summary Judgment was struck. The remaining objections to the evidence designated in support of the motions for summary judgment were overruled.
12. On April 28, 2006, the IDEM filed a Motion to Continue the oral argument. This motion was granted and the oral argument was reset for June 13, 2006.
13. On June 12, 2006, the Petitioner filed Terre Tech's Motion to Continue Hearing on Summary Judgment Motions.
14. The IDEM filed a Notice to Office of Environmental Adjudication Regarding Motion for Summary Judgment and Underlying Cause on June 13, 2006.
15. The ELJ issued an Order Continuing Hearing and Order for Status Report on June 14, 2006.
16. The IDEM filed status reports on July 3, 2006 and September 25, 2006. The Petitioner filed a status report on September 20, 2006.
17. The ELJ issued a case management order on October 10, 2006 ordering the parties to file any supplemental materials on or before November 10, 2006 and responses to the supplemental materials within fifteen (15) days of service. On the Petitioner's motion, the deadline for supplemental materials was extended to December 9, 2006.

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18. On December 11, 2006, the Petitioner filed Terre Tech's Submission of Supplemental Materials. On December 21, 2006, the IDEM filed a Motion to Dismiss.

**Findings of Fact**

1. The City of Terre Haute (the "City") operates a Class IV, 24 MGD<sup>1</sup> activated sludge wastewater treatment plant. On December 10, 2003, the City submitted an application for renewal of its NPDES<sup>2</sup> permit for the plant.
2. On May 23, 2005, the IDEM issued Final NPDES Permit No. IN0025607 (the "Permit") to the City of Terre Haute. This Permit contained paragraph I(H) which states:

In the event that the permittee decides to accept any process wastewater from the Marathon Oil Refinery into the Terre Haute Publicly Owned Treatment Works, the permittee is required to submit a request to IDEM to modify its NPDES permit at least 180 days prior to the proposed commencement of such discharge into the Terre Haute POTW. The permittee cannot accept the proposed discharge until the requested NPDES permit modification has been issued by IDEM. This provision is applicable to either a direct discharge of the wastewater into the wastewater treatment plant or an indirect discharge of the wastewater through an industrial contributor to the collection system.

3. Terre Tech, Inc. (the "Petitioner") filed a Petition for Review objecting to the inclusion of this paragraph in the Permit. The Petitioner did not object to any other provisions of the Permit.
4. The Petitioner had planned to operate a facility which would accept and treat the process wastewater from the Marathon Oil Refinery in Robinson, Illinois. The wastewater from the Terre Tech facility would be discharged to the Terre Haute POTW.
5. On or about August 25, 2006, the IDEM issued a Final Modification NPDES Permit No. IN0025607 to the City of Terre Haute for its wastewater treatment plant. The IDEM deleted paragraph I(H) from the final modification to the Permit.
6. No person filed a petition for review objecting to the modification of the Permit. Therefore, the final modification was effective on October 1, 2006.

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<sup>1</sup> Million gallons per day

<sup>2</sup> National Pollutant Elimination Discharge System

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**Conclusions of Law**

1. The Office of Environmental Adjudication (“OEA”) has jurisdiction over the decisions of the Commissioner of the IDEM and the parties to the controversy pursuant to IC 4-21.5-7-3.
2. Findings of fact that may be construed as conclusions of law and conclusions of law that may be construed as findings of fact are so deemed.
3. This Court must apply a *de novo* standard of review to this proceeding when determining the facts at issue. *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615 N.E.2d 100 (Ind. 1993). Findings of fact must be based exclusively on the evidence presented to the ELJ, and deference to the agency’s initial factual determination is not allowed. *Id.*; I.C. 4-21.5-3-27(d). “*De novo* review” means that:

all are to be determined anew, based solely upon the evidence adduced at that hearing and independent of any previous findings.

*Grisell v. Consol. City of Indianapolis*, 425 N.E.2d 247 (Ind.Ct.App. 1981).

4. The IDEM argues that the Permit modification, in which the offending paragraph was deleted, renders this case moot and, therefore, it should be dismissed.<sup>3</sup> “When a dispositive issue in a case has been resolved in such a way as to render it unnecessary to decide the question involved, the case will be dismissed.” *Travelers Indem. Co. v. P.R. Mallory & Co.*, 772 NE.2d 479, 484 (Ind. App. 2002). A case is deemed moot when there is no effective relief that can be rendered to the parties by the Court. *A.D. v. State*, 736 N.E.2d 1274, 1276 (Ind. App. 2000).
5. Because the offending paragraph was deleted, the Petitioner’s technical arguments regarding whether the IDEM was correct in deciding the wastewater from the Marathon Oil Refinery required a modification of the City’s NPDES Permit are moot. However, the Petitioner also asserts that the requirements of Paragraph I(H) amount to an unconstitutional restriction on interstate commerce and to an unconstitutional taking of property. The Petitioner argues that this matter is not moot and should not be dismissed<sup>4</sup> because (1) this case raises issues of great public interest and (2) the Office of Environmental Adjudication has the authority to address constitutional issues.
6. This Court “may decide an arguably moot case on its merits if it involves questions of great public interest.” *Id.* “Cases that fit within this exception typically are those containing issues that are likely to recur.” *Id.* Indiana’s courts have determined that the likelihood of recurrence was sufficient to overcome a challenge for mootness in the review of a three-

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<sup>3</sup> IDEM has raised the argument that this matter is moot in its June 13, 2006 Notice to Office of Environmental Adjudication Regarding Motion for Summary Judgment and Underlying Cause, the July 3, 2006 and September 25, 2006 status reports and the December 21, 2006 Motion to Dismiss.

<sup>4</sup> See Petitioner’s Opposition to IDEM’s Motion for Summary Judgment, filed December 16, 2005.

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month commitment at a juvenile correctional facility in *A.D. v. State*, supra.; hardship restrictions on a temporarily-suspended driver's license in *Gibson v. Hernandez*, 764 NE.2d 984 (Ind.Ct.App. 2002); a case management order enjoining litigation in another forum in *Traveler's Indem. Co.*, supra.; a county's practice of not correcting forwarding addresses on property tax delinquency notices in *McBain v. Hamilton County*, 744 N.E.2d 984 (Ind.Ct.App. 2001), trans. den.; competitive bidding process challenged by taxpayers after bid contract had been completed in *Irwin R. Evens & Sons, Inc. v. Board of Airport Authority*, 584 N.E.2d 576 (Ind.Ct.App. 1992); a family's right to determine an incompetent family member's withdrawal of nutrition and hydration in *Matter of Sue Ann Lawrence*, 579 N.E.2d 32, 37 (Ind. 1991); emergency injunction sought in statutory application of fish and game regulations concerning gill net fishing brought by fishing interest group and restaurant in *Ridenour v. Furness*, 514 N.E.2d 273, 274-275 (Ind. 1987); violations of statutory "status quo" provisions in school collective bargaining in *Indiana Educ. Employment Relations Bd. V. Mill Creek Classroom Teacher's Ass'n*, 456 N.E.2d 709, 711-712 (Ind. 1983); mandate to school trustees to grant transfer of students from one school to another in *State ex rel. Smitherman v. Davis*, 238 Ind. 563, 151 N.E.2d 495 (1958).

7. After examining the facts of this case and based on the ELJ's experience in the environmental field and, in particular, her knowledge of issues previously raised before the OEA, the ELJ concludes that this factual situation and issue is not likely to recur and therefore, is not a matter of "great public interest".
8. The Petitioner argues that that this case is not moot because there are constitutional issues that have been raised and should be decided by the ELJ. The United States Supreme Court in *Califano v. Sanders* (1977) 430 U.S. 99, 109, 97 S. Ct. 980, 986, 51 L. Ed. 2d 192, 201-2 stated, "Constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions." The Indiana Supreme Court in *Wilson v. Review Board of Ind. Emp. Sec. Div.*, 270 Ind. 302, 385 N.E. 2d 438 (Ind. 1979), says "In the present case, the question presented is of constitutional character. With all due respect, we think that the resolution of such a purely legal issue is beyond the expertise of the Division's administrative channels and is thus a subject more appropriate for judicial consideration."
9. Even if the ELJ determined that there had been an unconstitutional taking of property in this case, the ELJ does not have the authority to award damages to the Petitioner. *In Re Objections to the Denial of Extension of Reply Period and Denial of Operating Permit Renewal for the Mallard Lake Landfill, Madison County, Indiana* 2004 OEA 82 (03-S-J-3185).
10. This matter is moot and should be dismissed.

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**ORDER**

**AND THE COURT**, being duly advised, **GRANTS** the IDEM's Motion to Dismiss and **ORDERS, ADJUDGES AND DECREES** that this matter is **DISMISSED**.

You are hereby further notified that pursuant to provisions of IND. CODE § 4-21.5-7.5, the Office of Environmental Adjudication serves as the Ultimate Authority in the administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. This is a Final Order subject to Judicial Review consistent with applicable provisions of IC 4-21.5. Pursuant to IC 4-21.5-5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

IT IS SO ORDERED THIS 10th day of January, 2007.

Catherine Gibbs  
Environmental Law Judge